REPUBLIC OF LATVIA
SUPREME COURT
SENATE

ACA EUROPE

Seminar organized by the Supreme Court of the Republic of Latvia in cooperation with ACA-Europe

Riga, 27 April 2023

Questionnaire
The judge and inert administration. Administrative discretionary power

Introduction

The seminar will address the issue of inert administration and the role and competence of the courts in this regard. The inaction or silence of the authorities and its consequences affect the rights of individuals no less significantly than the administrative actions or administrative acts of the authorities. While institutional silence is mainly related to the managerial aspects of public administration, it also interacts and correlates with legal aspects, such as principles of legal certainty, good administration and the prohibition of arbitrariness. The aim of the questionnaire and the seminar is therefore to summarise and analyse the regulation and practice of the Member States in order to determine whether the rights of individuals in the context of administrative silence converge and are comparable in the different legal systems.

As the administrative silence is mainly related to the failure of authorities to act or to reply within the prescribed procedural time limits, the questions in the first section of the questionnaire will provide insights into the regulation and application of procedural time limits in the Member States. The following sections of the questionnaire contain questions that are directly related to the current national regulations of the administrative silence. The regulations are generally classified into a negative model (silence as deemed refusal of a claim) and a positive model (a claim not refused in due time is deemed granted). Most legal systems usually provide for both models and various specific combinations. However, the understanding and regulation of these models, as well as the various exceptions and specific rules, differs among legal systems. The questionnaire also seeks to identify national experiences in implementing Article 13(4) of Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market, intended as a mechanism of simplifying and speeding the administrative activity. And finally, as one of the most important aspects, the questionnaire will clarify the role and competence of the courts in the process of appeal against fictitious acts resulting from administrative silence, also identifying the legal remedies. The questionnaire is intended to identify mentioned aspects for further workshop discussions.

The seminar is also intended to discuss issues of administrative discretionary power. The most ambiguous aspects of this matter relate to the identification of the

Co-funded by
the European Union

discretionary power in each specific case, as well as to the competence of the court and limits of judicial review of use of discretionary power by the authority. The practice and approach of the Member States on this issue vary. Some legal systems between discretion in a narrow sense and margin of appreciation in the interpretation of undefined legal concepts. However, in most legal systems no such distinction is made. There are also differences in the methods, characteristics or mechanisms used to determine whether an authority has discretionary power in a particular case. The questionnaire thus aims to identify national regulations and practices on the mentioned issues.

Answers to the questionnaire of the Administrative Court of the Republic of Serbia

Administrative time limits

1. Are specific administrative time limits within which authorities must take administrative decisions or complete administrative actions set in your legal system?

   - **Yes**
   - No
   - Only in certain areas of law

   Please specify your answer briefly, if necessary

2. Where are the administrative time limits set:

   - The Constitution
   - **The General code of administrative law or administrative procedure law**
   - **Special laws**
   - Other

   Please specify your answer briefly, if necessary

3. Is the concept of "reasonable time" for the setting of administrative time limits defined and applied in your legal system or case-law?
   In the administrative-legal system of the Republic of Serbia, in accordance with the European Convention of Human Rights, the concept of "reasonable time" is defined in the following way:

- **The Constitution of the Republic of Serbia (Official Gazette of the Republic of Serbia 98/2006 and 115/2021) as one of the fundamental human rights**

prescribes the right to fair trial, within which it prescribes the right to trial within reasonable time.

- **In addition, according to Article 2 of the Law on Administrative Disputes (Official Gazette 111/09), in an administrative dispute, the Court decides on the basis of the law and within a reasonable time.**
- **Also, the Law on the Protection of Trial within a Reasonable Time (Official Gazette 40/2015) was adopted, which regulates the protection of the right to trial within reasonable time.**

4. Describe the general time limits in which administrative decisions are made in your legal system.

The general time limits in which administrative decisions are made in legal system of the Republic of Serbia is prescribed by the general procedural law. When the procedure is initiated at the request of the party or ex officio, and in the interest of the party, and when the administrative matter is decided in the direct decision-making procedure, the authority is obliged to issue a decision within 30 days from the initiation of the procedure at the latest. When the procedure is initiated at the request of the party or ex officio, and in the interest of the party, and when the administrative matter is not decided in the direct decision-making procedure, the authority is obliged to issue a decision within 60 days from the initiation of the procedure at the latest. Article 174 of the Law on General Administrative Dispute stipulates that the decision by which it is decided upon appeal, the second-instance authority shall issue without delay and within 60 days from the submission of the formal appeal at the latest.

5. Is it possible to extend the administrative time limits? Under what circumstances?

Authorized administrative body may issue a requested act and also after expiring deadline, if the party filed an appeal becase the first-instance authority failed to issue a decision within the prescribed period.

6. Does a person have the right to complain about the authority's decision to extend the time limit?

No.

7. If an administrative decision is unfavourable to the submitter or the potential addressee of the decision, can it still be made after the expiry of the time limit?

   - **Yes**
   - No
   - No, unless the delay on the part of the institution has a proper justification
   - Other

   Please specify your answer briefly, if necessary

8. Is failing to comply with established administrative time limits a common problem in your country?

   - **Rather yes**
   - Rather no

9. What are the main reasons for failing to comply with administrative time limits in your country?

   - Lack of clear regulation
   - **Lack of institutional capacity**
   - Deficiencies in the administration of the authorities
   - Deficiencies at national policy level
   - **Other**

   Please specify your answer briefly

10. Are there any penalties, disciplinary or criminal liability for authorities or their staff with regards to not complying with the time limits?

Yes. For example, the Article of the Law on the Procedure for Registration in the Cadaster of Immovable Property and Utilities prescribes that civil servant who is a head of the Department/Service and authorized civil servant in the lower/smaller internal unit of the Department/Service, responsible for resolving cases will be punished for a misdemeanor by imposing upon him/her a fee amounting from 10.000 to 50.000 dinars (approximately 90-480 euros) if he/she does not decide on the request for registration, which can be dealt in priority way within the period prescribed by this law.

Administrative silence

1. Does your national legislation define "administrative silence" as a legal concept? Please specify.

Legal concept of the administrative silence is defined in the Serbian national legislation.

2. Does your legal system provide for a negative model of administrative silence (deemed refusal of a claim)?

   Yes.

3. Does your legal system provide for a positive model of administrative silence (a claim not refused in due time is deemed granted)?

   No.

4. Which regulatory model of administrative silence is more typical for your legal system?

In the Serbian legal system, the model of "administrative silence" prevails, which is considered a rejection of the lawsuit.

Legal construction of the „administrative silence" is based on the two legal elements: legal fiction (fictio) that an administrative dispute exists (even though it does not exist in reality) and on the legal assumption (presumption legis) that the appeal, i.e. a request of a party was rejected by the administrative act (negative administrattive act). At the same time, the subject of the administrative dispute was also legally constructed in this way, i.e. the administrative act, in situation where it does not actually exist.

The negative model

1. What are the types of administrative procedures that the negative model can be applied to:

   - **Procedures that are initiated on the basis of an application or claim by a person**
   - **Ex officio procedures**
   - Other

   Please specify your answer briefly, if necessary

Law on General Administrative Procedure in Article 145 stipulates that the issuance of a decision is the adoption and notification of the party about the adopted decision.

When the procedure is initiated at the request of the party or ex officio, and in the interest of the party, and when the administrative matter is decided in the direct decision-making procedure, the authority is obliged to issue a decision within 30 days from the initiation of the procedure at the latest. When the procedure is initiated at the request of the party or ex officio, and in the interest of the party, and when the administrative matter is not decided in the direct decision-making procedure, the authority is obliged to issue a decision within 60 days from the initiation of the procedure at the latest.

2. Does the negative model mean that a person's application or claim is automatically considered to be rejected or are extra actions required in order for the person to be able to appeal the rejection (for example, does the person have to provide proof that authority has been silent on the particular matter in order for it to be able to appeal the rejection)?

The negative model of the administrative silence is considered that a person's application or claim is automatically considered to be rejected.

3. Is the process for appealing against a "fictitious refusal" resulting from an administrative silence different from the general appeals process (for example, is there a different time limit or review body than in general appeals process)? Please describe the main differences.

In the appeal procedure due to the silence of the first instance administrative body, the same authority acts in relation to the general appeal procedure. Its procedure differs from the general appeal procedure. In the appeal procedure, the second-instance authority requests that the first-instance authority shall inform the second-instance authority why it failed to issue a decision in a timely manner. If the second instance authority finds that the first-instance authority did not issue a decision within the time limit specified by law for a justified reason, it extends the deadline for issuing a decision for a period as long as the justified reason lasted, and 30 days at the latest. If the second-instance body finds that there is no justified reason for failing to issue the decision within the deadline specified by law, it decides on the administrative matter by itself or orders the first-instance body to issue a decision within a period no longer than 15 days.

If the first-instance authority does not issue a decision again within the deadline set by the second-instance authority, it decides on the administrative matter by itself.

4. Can the "fictitious refusal" resulting from an administrative silence be appealed in court?

Yes.

5. What is the competence of the court if the "fictitious refusal" is found to be unjustified:

   - The court can order the administrative authority to issue a decision, but cannot set a specific time limit in which it shall be done
   - **The court can order the administrative authority to issue a decision within a certain time limit**
   - **The court can decide upon the matter itself**
   - Other

   Please specify your answer briefly

According to the law on Administrative Disputes, when a lawsuits is submitted due to the administration's silence, and the court finds that it is founded, it will accept the lawsuit and order the competent authority to make a decision. If the court has the necessary facts, and the nature of the subject matter allows/permits it, it can directly resolve the administrative matter with its judgment.

6. What legal remedies are available in your legal system if an authority has failed to comply properly with a court order to issue a decision?

The party has the right to submit a separate brief/submission before the Court, which issued the judgment, to issue such a decision.

7. In which cases the court has the competence to decide upon the matter itself instead of the "silent" authority:

   - In all cases
   - Only in cases of objective urgency
   - Only in cases which concern significant rights of the person
   - **Only in cases in which the authority has no discretionary power or it is limited to zero**
   - Never, because only the authority can make a decision
   - **Other (if permitted by the nature of the subject matter)**

The positive model – answer: not applicable

1. What is the main purpose of the positive model in your legal system?

   - To simplify certain administrative procedures

- To protect the rights of individuals in case an authority fails to comply with the administrative time limits

Please specify your answer briefly

2. Are there any prohibitions or restrictions on the application of the positive model in certain areas of law in your legal system?

3. When (a specific moment or particular circumstances) is the person's claim deemed to have been granted?

4. Does the person have to get any kind of confirmation or proof that the claim has been granted? Where and within what time limit does it need to be received?

5. Are there any legal remedies available to third parties affected by the "fictitious decision" of granting a claim, if necessary?

6. Is there a certain procedure that allows to annul a "fictitious decision" of granting a claim? If yes, are there any differences from the general procedure?

7. Please describe the implementation of the positive silence model provided for in Article 13(4) of Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market in your legal system. In which legal areas has it been implemented? Have there been any difficulties in its' implementation?

Other legal remedies <u>answer: not applicable</u>

1. What legal remedies exist in your legal system in situations of administrative silence where the law does not regulate the administrative silence neither in accordance with the positive, nor the negative model?

2. Is a person entitled to claim a compensation for financial loss or non-financial damage which has been caused as a result of the administrative silence of the authority?

<u>Case law and regulation in non-harmonised sectors of law</u>

1. Do you have any case-law where national regulation on administrative silence has been found unfounded or inapplicable in a particular case?

   Not applicable.

2. Do you have any case law on the application or interpretation of the positive model provided for in Article 13(4) of Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market? If so, please describe the substance of the most relevant cases.

   Not applicable.

3. Have you submitted a question to the Court of Justice of the European Union in order for it to make a preliminary ruling in a case concerning national regulation on administrative silence? Briefly describe the request and the substance of the judgment.

   Not applicable.

4. Briefly describe the national regulation on administrative silence in the following legal areas:

   4.1. Construction, spatial development planning and environmental protection

Negative presumption (the requested right is not considered as being exercised merely because the public authority hasn't decided upon the request, but the request is considered rejected.

   4.2. Social security

Negative presumption (requested right is not considered as being exercised merely because the public authority hasn't decided upon the request, but the request is considered rejected.

   4.3. Freedom of information

Negative presumption (requested right is not considered as being exercies merely because the public authority hasn't decided upon the request, but the request is considered rejected.

Administrative discretionary power

1. How is administrative discretionary power defined in your legal system?

Discretionary administrative act is an act the contents of which are not formerly determined, but the authority issuing such act has the option to select one of two or more legally equal possibilities. Legality of performing discretionary assessment consists of three elements. First, it is necessary to obtain legal authorization for discretionary decision-making. The presence of this authorization is, by rule, recognized through the usage of specific phrases in law or other regulations, such as "may", "may decide", "if found", "if evaluated", "authority decides whether", "as needed", "authority is given power" etc. In order to determine whether the legislator has in mind issuance of the act per discretionary authorization, sometimes it is necessary to interpret the law in a systematic manner. Second, by applying discretionary power, the authority is obliged to observe limitations provided by given authorization. Third, when issuing an act, it is necessary to observe the goal for which the discretionary power is given, that is, the achievement of specific public interest.

2. Does your legal system distinguish between discretion (*deutsch – Ermessen*) and margin of appreciation (scope of appraisal) in the interpretation of undefined legal concepts (*deutsch – Beurteilungsspielraum*)?

Legal system in the Republic of Serbia does not distinguish between the discretionary right (*German – Ermessen*) and margin of appreciation (*German – deutsch – Beurteilungsspielraum*).

3. What are the characteristics, criteria or methods used in your legal system to determine whether an authority has discretionary power in a particular case? Provide the most typical examples of case law where the discretionary power has been recognised.

Answer to question No. 1 applies here as well.

If your legal system distinguishes between discretion and margin of appreciation, please describe both.

Our legal system does not distinguish between discretion and margin of appreciation.

4. Is there a limit of judicial review of use of discretionary power by the authority in your legal system? If so, please explain possibilities of court examination and assessment in such a case?

   If your legal system distinguishes between discretion and margin of appreciation, please describe both.

According to the Law on Administrative Disputes, discretionary administrative act can be contested by the claim in the administrative dispute if the public authority surpasses the limits of legal authorization within the act, or if such act is not issued in accordance with the goal the authorization was given for. The full control of legality can be performed in relation to legally connected parts of the acts issued on the basis of discretionary assessment. The control of discretionary assessment can be fully performed before the second-instance administrative authority, because only such authority can examine the suitability of the discretionary assessment, that is the question of whether the selected alternative protects the public interest in given case in an optimal manner. Discretionary assessment cannot be contested before the court because the court in the administrative dispute assesses the legality and not the suitability of the disputed act. If the discretionary assessment is performed within the limits of authorization and in accordance with the goal for which the authorization is given, the court cannot perform further assessment of suitability, but it can annul the contested act, but cannot decide on behalf of the administrative authority.

5. Is judicial review affected by the fact that the discretionary power used by the authority has resulted in a restriction of human rights? **Yes.**

   Is the intensity of judicial review in such a case different from that in the case of no administrative discretion?

It is not the intensity, but the type of decision issued by the Court that can be different.